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No. 87-377

In the Supreme Court of the United States

OCTOBER TERM, 1987

ELISE D. MCINTOSH, ET AL., CROSS-PETITIONERS

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Blonder-Tongue Labs. v. *University Found.*, 402 U.S. 313 (1971) 4
Commissioner v. *Sunnen*, 333 U.S. 591 (1948) 5
Nevada v. *United States*, 463 U.S. 110 (1983) 5
Stafford v. *Briggs*, 444 U.S. 527 (1980) 4
Standefer v. *United States*, 447 U.S. 10 (1980) 4
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 4
United States v. *Mendoza*, 464 U.S. 154 (1984) 4

Statute:

Civil Rights Act of 1964, § 717, 42 U.S.C. 2000e-16 1

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Cross-petitioners [hereinafter petitioners] are three civilian employees of the Department of the Army who alleged, inter alia, that they were denied certain promotions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.[1] The same complaint included a *Bivens* action against an agency official assigned to investigate their claims of discrimination, alleging that he violated their due process rights by destroying materials generated as part of his investigation. This latter claim went to trial first before a jury and, following a judgment

[1] The legitimate cross-petitioners in this case are Elise McIntosh, Susan Sorrells, and Odessa Hollis, all of whom pursued and lost a Title VII claim against the federal cross-respondents [hereinafter respondents] in the district court. Two other persons, Ann Kennedy and Joanne Scherbring, who did not bring any Title VII action, are improperly listed as cross-petitioners. Their age discrimination claims, which were properly dismissed without prejudice by the district court pending exhaustion of administrative remedies, were subsequently rejected at the administrative level and are currently pending, once again, before the district court.

for the plaintiffs, the Title VII claims were tried to the court, resulting in judgment for the Army. The court of appeals affirmed both aspects of the judgment.

The present cross-petition is filed in response to a petition for certiorari filed by the agency official, Edward Turner, seeking review of the *Bivens* judgment against him. The cross-petition contends that the judgment against Turner collaterally estopped the district court in the Title VII suit from finding no discrimination in the underlying personnel actions. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. The cross-petition should, therefore, be denied.

1. Petitioners applied but were not selected for certain promotions in early 1981 (Pet. App. 7a-8a).[2] They filed informal discrimination complaints and contacted their Congressmen, claiming that the selection process was unfairly conducted (*id.* at 8a-9a). Edward Turner, an assistant civilian personnel officer, was asked by Army headquarters to review the promotion decisions in response to congressional inquiries made on behalf of petitioners (*id.* at 9a). His report, which concluded that the original determinations were "defensible," formed a basis for the response to the congressional inquiries (*id.* at 11a). In the meantime, petitioners' informal discrimination complaints were resolved against them administratively, and they filed formal complaints with the United States Army Civilian Appellate Review Agency (*id.* at 9a).

Petitioners subsequently filed this suit, which included the present Title VII allegations and the *Bivens* claim against Turner. Following the jury trial of the claim against Turner, which culminated in a general verdict in

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[2] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Turner* v. *McIntosh*, No. 87-174.

favor of petitioners,[3] the court conducted a bench trial on the discrimination claims and found for respondents. The court found that petitioners had established a prima facie case of discrimination, but that respondents had articulated a legitimate non-discriminatory reason for their nonselection—*i.e.*, that the persons ultimately selected were considered more qualified (Pet. App. 63a). The court concluded that petitioners had failed to meet their burden of showing either that the proffered reason was unworthy of credence or that the employment decisions more likely than not were motivated by discrimination (*id.* at 64a-66a).

Petitioners argued on appeal, inter alia, that in the earlier trial on the *Bivens* claim, the jury necessarily found that petitioners were "best qualified" for the positions in question and that collateral estoppel precluded a contrary finding on that issue by the district court in the discrimination suit. The court of appeals rejected that argument noting, first, that the jury gave only a "general verdict" in favor of petitioners so that it was impossible to be certain "what specific facts the jury found." Pet. App. 29a. The court of appeals held further that even assuming the jury verdict meant that petitioners were best qualified for the jobs in question, the Title VII action raised the different question "whether the promoting officials (acting long before the reconstruction overseen by Turner) believed (whatever the actual fact) that the persons promoted were better qualified than [petitioners]" (*ibid.*). Since the two issues were not identical, the jury's verdict on the constitutional tort claim did not control the discrimination claim tried to the district court (*ibid.*).

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[3] The jury awarded damages against Turner in his individual capacity totalling $110,005, and the district court entered judgment for the five plaintiffs (see n.1, *supra*) in that amount, plus interest and costs. The court of appeals affirmed. Turner has filed a petition for a writ of certiorari on the *Bivens* claim. See *Turner* v. *McIntosh*, petition for cert. pending, No. 87-174.

2. Petitioners' collateral estoppel argument is meritless for two reasons. First, the Department of the Army was not a party to the first suit and, thus, cannot be estopped in the second suit. Petitioners' *Bivens* action was brought against Turner in his individual capacity. Petitioners' Title VII claim is against the Department of the Army, with respondents Weinberger and Marsh named only in their official capacities. See generally *Stafford* v. *Briggs*, 444 U.S. 527 (1980) (distinguishing suits against federal employees in their individual capacities from suits nominally or in essence against the United States). While collateral estoppel has been found applicable among private litigants in the absence of strict mutuality, at least the party against whom nonmutual collateral estoppel is invoked must have been a party to the prior suit.[4] Petitioners simply "[fail[] to recognize the obvious difference * * * between a party who has never litigated an issue and one who has fully litigated and lost * * *." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 (1979). The Department of the Army cannot be deprived of at least one "full and fair opportunity" to present its case. *Standefer* v. *United States*, 447 U.S. 10, 24 (1980); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 328; *Blonder-Tongue Labs.* v. *University Found.*, 402 U.S. 313, 328 (1971). Petitioners state (Cross-Pet. 9-10) that "Turner was * * * represented by the same government attorneys who also represented the agency in the Title VII counts." However, collateral estoppel applies against parties, not attorneys.

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[4] Offensive use of collateral estoppel permits a new plaintiff to invoke the doctrine against a defendant who has already litigated the same issue in a prior case. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). Defensive use of collateral estoppel permits a new defendant to invoke the doctrine against a plaintiff who has already litigated the same issue in a prior case. See *Blonder-Tongue Labs.* v. *University Found.*, 402 U.S. 313 (1971). Nonmutual collateral estoppel does not, however, apply against the United States. *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984).

Second, the court of appeals correctly concluded that the issues in the two proceedings were not identical. Without such identity of issues there can be no estoppel. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 130 n.11 (1983); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948). The jury in the *Bivens* action issued only a general verdict for petitioners, finding that Turner violated petitioners' constitutional rights during his investigation, an investigation which necessarily took place after the hiring decisions at issue in the Title VII suit. The jury was never asked to decide, and logically need never have considered, the question which the district court and the court of appeals found dispositive in the Title VII action (Pet. App. 29a), which is whether the selecting officials believed that the persons actually promoted were better qualified for the positions than petitioners.[5] Its verdict, therefore, cannot be dispositive on that point.

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[5] Only by incautious inference can it even be said that the jury "must have concluded" that the evidence destroyed by Turner indicated that petitioners were in fact the best qualified for the positions in question. The district court instructed the jury on the *Bivens* claims that in order to find for petitioners it must find, inter alia, that a second panel convened to review the original personnel decisions (a panel whose results Turner was alleged to have improperly suppressed and destroyed) "did in fact select the best qualified people for the positions" in question (Cross-Pet. App. A2). It is not at all clear what this means, since there is no corresponding instruction requiring the jury to find that the second panel concluded that petitioners were those "best qualified people." In any event, "best qualified" is a term of art in federal personnel matters denoting those applicants who, after a second screening, are referred to the selecting official (see Pet. App. 6a-7a, 64a). As happened here, a panel frequently refers many more "best qualified" candidates to the selecting official than there are positions to fill. It is not up to the rating panel to determine whether any particular "best qualified" applicant is better suited for the position than any other "best qualified" applicant. That is left entirely to the selecting official. Thus, even if the jury's general verdict could be construed as a specific finding that plaintiffs were "best qualified," it cannot be construed as a finding that the panel determined that plaintiffs were entitled to the jobs.

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.[6]

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OCTOBER 1987

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[6] Turner's petition in No. 87-174, on the other hand, does present a substantial question and should be disposed of in light of *Kotarski* v. *Cooper*, petition for cert. pending, No. 86-1813 (filed May 13, 1987), a case which presents substantially the same issue. It is not necessary to hold this cross-petition until the resolution of No. 87-174, however, since this cross-petition presents no issue that either warrants the Court's review or would be affected by the disposition of No. 87-174.

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